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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. ~~628~~ 41

LESLIE T. ALWARD, PETITIONER,

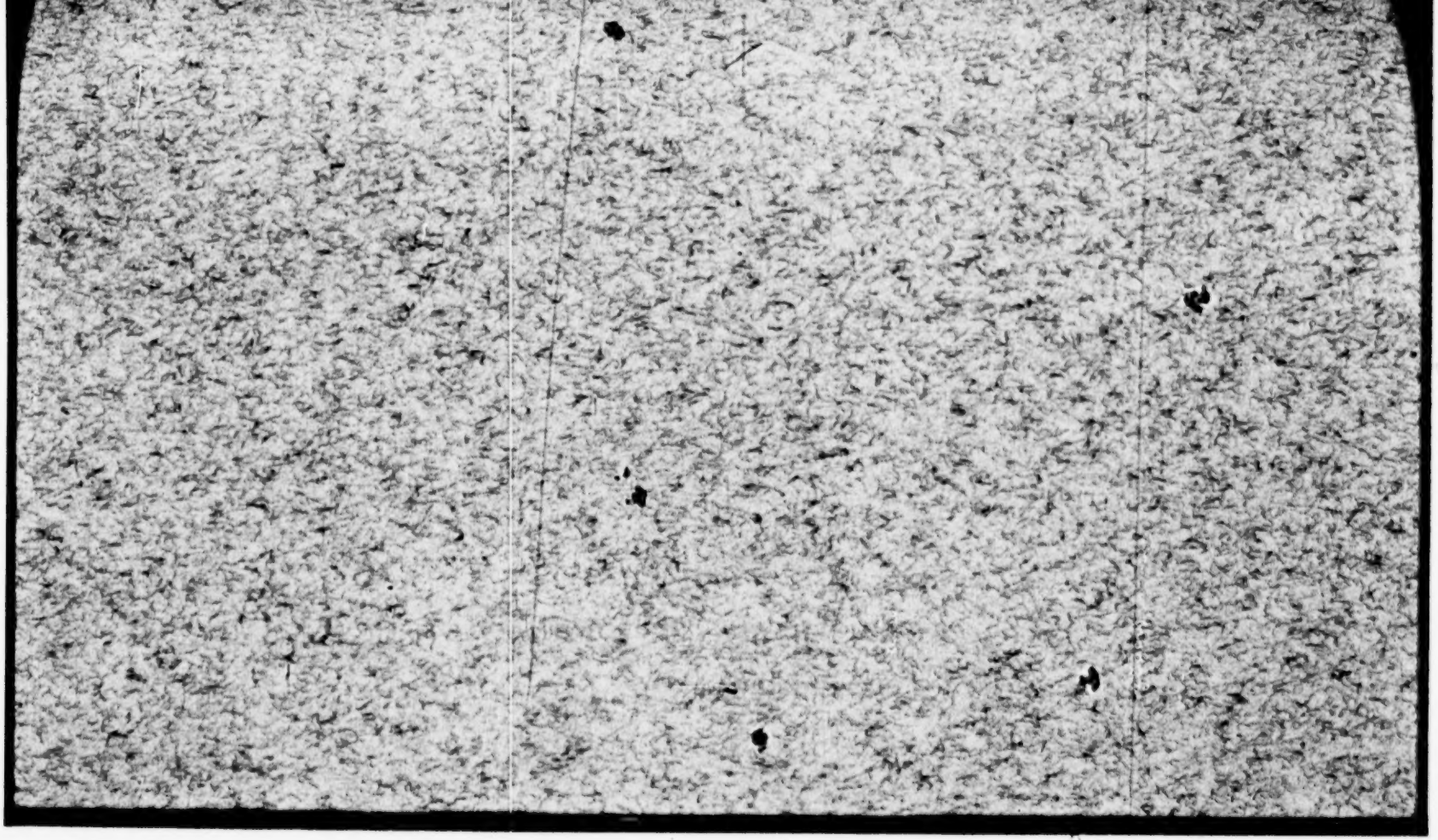
vs.

C. G. JOHNSON, TREASURER OF THE STATE OF CALIFORNIA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

BURKE CORBET,
Crocker-1st National Bank Building,
San Francisco, California;
SIMEON E. SHEFFEY,
904 *Hunter Dulin Building,*
San Francisco, California,
Solicitors for Petitioner.

(34,759)



INDEX.

Subject Index.

	Page
I. Opinion of the court below	7
II. Jurisdiction	8
III. Statement of the case	8
IV. Argument	8
A. The tax in question is a direct tax upon a Federal mail contract and is a tax upon the means employed by the Federal Government to exercise its constitutional powers	8
B. The tax as levied is arbitrary, confiscatory, and constitutes the taking of property without due process of law	17
1. The gross-receipts tax on highway transportation companies is essentially a tax upon operative property and is not a tax on gross receipts or income of such property	17
2. The gross-receipts tax is intended to be approximately the equivalent of an ad valorem tax on the property at a given rate. It was fixed so as to make the tax the equivalent as a fair tax value on all operative property in use at its value	19
3. A plan of taxation that is arbitrary and the valuation grossly excessive is in violation of the Fourteenth Amendment of the United States Constitution	23
Conclusion	32

Table of Authorities Cited.

Bankers Mut. Casualty Co. v. Minneapolis, etc., R. Co., 117 Fed., 434; 54 C. C. A., 608; 65 L. R. A., 397 (aff. 113 Fed., 414)	30
Bolan v. Williamson, 2 S. C. L., 551	31
Boston Ins. Co. v. Chicago, etc., R. Co., 118 Iowa, 423; 92 N. W., 88; 59 L. R. A., 796	31

Page

Central R. Co. v. Lampley, 76 Ala., 357; Am. R., 334..... 31
Commonwealth of Pennsylvania v. Lehigh Valley Railroad Co., 4 Dauphin County Reports, 174..... 16
Conwell v. Voorhees, 13 Oh., 523; 42 Am. D., 206..... 31
Dunlop v. Munroe, 7 Cranch, 242; 3 L. Ed., 329..... 30
Foster v. Metts, 55 Miss., 77; 30 Am. R., 504..... 31
Frost v. Railroad Comm., 197 Cal., 230; 271 U. S., 583..... 28
Graysburg Oil Co. v. Texas, 278 U. S., 582..... 12
Edward W. Hopkins v. So. Cal. Telephone Co. and The Pacific Telephone & Telegraph Co., 275 U. S., 393..... 21
Hutchins v. Brackett, 22 N. H., 252; 53 Am. D., 248..... 31
Louwein v. Moody, 12 S. W. (2d), 980..... 12
Metcalf & Eddy v. Mitchell, 269 U. S., 514..... 13
Panhandle Oil Co. v. Mississippi, 277 U. S., 218..... 12
People of the State of N. Y. v. Jacob A. Cantor, 236 N. Y., 417.. 14
Powell v. Mills, 30 Miss., 231; 64 Am. D., 158..... 31
Pullman Co. v. Richardson, 185 Cal., 484..... 18, 19, 25
Railroad Co. v. Peniston, 85 U. S., 5..... 8, 14
San Francisco v. Western Union Tel. Co., 96 Cal., 140..... 12
Schroyer v. Lynch, 8 Watts, 453..... 31
Telegraph Co. v. Texas, 105 U. S., 460..... 12
Union Tankline Co. v. Wright, 249 U. S., 275..... 26
Western Union Tel. Co. v. City of Richmond, 26 Grat., 1..... 11
Wiggins v. Hathaway, 60 Barb., 632..... 31

CONSTITUTIONAL REFERENCES.

Section 15, Art. XIII..... 17, 27
Section 14, Art. XIII..... 19

REPORTS.

State Board of Equalization, 1912, pp. 7-8..... 20

TEXTBOOKS.

2 Camp. Comm. (12th Ed.), 610..... 30
10 C. J., 39..... 27
10 C. J., 52..... 30

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 628

LESLIE T. ALWARD, PETITIONER,

vs.

C. G. JOHNSON, TREASURER OF THE STATE OF CALIFORNIA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The petition of Leslie T. Alward respectfully shows to this Honorable Court:

I.

Summary and Short Statement of the Matter Involved in This Case.

Leslie T. Alward, petitioner, is engaged in carrying United States mails and parcels post between Redding,

California, and Big Bar, California, under a contract entered into by petitioner with the Post Office Department of the United States Government. On November 2, 1926, the people of the State of California adopted Section 15 of Article XIII of the Constitution of the State of California. By the terms of this section, highway transportation companies are taxed a percentage of their annual gross receipts in lieu of all other taxes as a tax upon the physical property of motor carriers operating within the State of California where such motor carriers are operating as *common carriers*. Pursuant to the provisions of this section, the State of California assessed and collected a tax against your petitioner herein at the rate provided for in said section and statutes passed by the Legislature of the State of California pursuant thereto, said statutes being Sections 3664*aa*, 3670*bb*, and 3670*cc* of the California Political Code, being also Ch. 19, Stat. 1927. In levying this tax against your petitioner herein, the State of California required your petitioner to report the amount of gross receipts received by your petitioner during the year 1926 from all sources, such as freight and passengers and including receipts for the carrying of United States mails and parcels post pursuant to the contract under which your petitioner herein was carrying said mails and parcels post. Upon the basis of the total of such receipts, your petitioner was taxed at the rate of 5 per cent of said gross receipts pursuant to said acts and statutes. Your petitioner herein paid the tax as levied under protest, claiming that the inclusion of gross receipts from

United States mails as a basis for the fixing of the amount of said tax was unlawful as violative of the United States Constitution, and that the amount of the tax as assessed was excessive and arrived at in an arbitrary manner, and far greater than the tax assessed against property similar to petitioner's but not so employed. Thereupon petitioner herein sued to recover a portion of said taxes so paid in an amount equal to 5 per cent of petitioner's receipts for carrying said mails (R. 1-5). Respondent demurred to petitioner's third amended complaint (R. 5), which demurrer was sustained without leave to amend. Thereupon judgment was rendered for your respondent herein (R. 5), from which judgment your petitioner appealed to the Supreme Court of the State of California (R. 6), and the Supreme Court of the State of California affirmed the judgment of the said Superior Court (R. 7-11) and thereafter denied petitioner's application for rehearing (R. 11). From the judgment of said Supreme Court your petitioner seeks this writ of certiorari.

II.

Reasons Relied on for the Allowance of the Writ.

A.

THE TAX IN QUESTION IS A DIRECT TAX UPON A FEDERAL MAIL CONTRACT AND IS A TAX UPON THE MEANS EMPLOYED BY THE FEDERAL GOVERNMENT TO EXERCISE ITS CONSTITUTIONAL POWERS.

B.

THE TAX AS LEVIED IS ARBITRARY, CONFISCATORY AND CONSTITUTES THE TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.

1. THE GROSS-RECEIPTS TAX ON HIGHWAY TRANSPORTATION COMPANIES IS ESSENTIALLY A TAX UPON OPERATIVE PROPERTY AND IS NOT A TAX ON GROSS RECEIPTS OR INCOME OF SUCH PROPERTY.

2. THE GROSS-RECEIPTS TAX IS INTENDED TO BE APPROXIMATELY THE EQUIVALENT OF AN AD VALOREM TAX ON THE PROPERTY AT A GIVEN RATE. IT WAS FIXED SO AS TO MAKE THE TAX THE EQUIVALENT AS A FAIR TAX VALUE ON ALL OPERATIVE PROPERTY IN USE AT ITS VALUE.

3. A PLAN OF TAXATION THAT IS ARBITRARY AND THE VALUATION GROSSLY EXCESSIVE IS IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

C.

THE DECISION OF THE SUPREME COURT OF CALIFORNIA IS IN CONFLICT WITH THE DECISIONS OF THE UNITED STATES SUPREME COURT ON QUESTIONS OF FEDERAL LAW.

Your petitioner has furnished a certified copy of the complete transcript of the record in said cause, including the proceedings in the Supreme Court of the State of California.

WHEREFORE your petitioner respectfully prays that a writ of certiorari may be issued out of this Honor-

able Court, directed to the Supreme Court of the State of California, commanding said court to certify and send to this Court for its review and determination, at a date to be therein designated, a complete transcript of all of the proceedings in said Supreme Court of the State of California in the cause entitled, "Leslie T. Alward, appellant, *vs.* Charles G. Johnson, Treasurer of the State of California, appellee, Sacramento, No. 4261, in the records of said Supreme Court, and that judgment and decree of said Supreme Court in said cause may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as this Honorable Court may seem meet and the nature of the case require.

And so your petitioner will ever pray.

Dated San Francisco, California, January 16, 1930.

LESLIE T. ALWARD,
Petitioner,

By BURKE CORBET,
SIMEON E. SHEFFEY,
Solicitors for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 628

LESLIE T. ALWARD, PETITIONER,

vs.

C. G. JOHNSON, TREASURER OF THE STATE OF CALIFORNIA, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

I.

Opinion of the Court Below.

Opinion of the California Supreme Court rendered October 7th, 1929 (R. 7-11): *Alward v. Johnson*, 78 Cal. Decisions, page 471.

II.

Jurisdiction.

The statutory provision believed to sustain jurisdiction is Section 237, Judicial Code, as amended Feb. 13, 1925, 43 Stat. L. 937.

III.

Statement of the Case.

Such statement is set forth in the petition (pp. 1 and 2) and is, therefore, not here repeated.

IV.

ARGUMENT.

A.

The tax in question is a direct tax upon a Federal mail contract and is a tax upon the means employed by the Federal Government to exercise its constitutional powers.

A State tax upon the *property* of one under contractual obligation to render service to the Federal Government to aid it in carrying out its governmental functions is not prohibited by constitutional limitations where it leaves such person free to discharge the duties undertaken. The Supreme Court of the United States so held in *Railroad Company v. Peniston*, 85 U. S., 5.

But the court there pointed out the following important distinction, at pages 35-37:

> "Here is a clear distinction made between a tax upon the property of a government agent and a tax upon the operations of the agent acting for the government. * * * In *McCulloch v. Maryland*, a difference was pointed out between a tax upon its *property* and one upon its *action*. In noticing an alleged resemblance between the bank and a government contractor, Chief Justice Marshall said: 'Can a contractor for supplying a military post with provisions be restrained from making purchases within a State, or from transporting the provisions to the place at which the troops were stationed? Or could he be fined or taxed for doing so? We have not heard these questions answered in the affirmative. It is true that the property of the contractor may be taxed; and so may the local property of the bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under State control.' This distinction, so clearly drawn in the earlier decisions, between a tax on the *property* of a governmental agent, and a tax upon the *action* of such agent, or upon his right to be, has ever since been recognized. All State taxation which does not impair the agent's efficiency in the discharge of his duties to the government has been sustained when challenged, and a tax upon his property generally has not been regarded as beyond the power of a State to impose. * * *
>
> It is, therefore, manifest that exemption of Federal agencies from State taxation is depend-

ent, not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their *property* has no such necessary effect. It leaves them free to discharge the duties they have undertaken to perform. A tax upon their *operations* is a direct obstruction to the exercise of Federal powers.

In this case the tax is laid upon the property of the railroad company precisely as was the tax complained of in *Thompson v. Union Pacific*. It is not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being. Nor is it laid upon any act which the company has been authorized to do. It is not the transmission of dispatches, nor the transportation of United States mails, or troops, or munitions of war that is taxed, but is exclusively the real and personal property of the agent, taxed in common with all other property in the State of a similar character."

Mr. Justice Bradley, with whom concurred Mr. Justice Field, dissenting, stated, at pages 41-42:

"The case differs *toto coelo* from that wherein the government enters into a contract with an individual or corporation to perform services necessary for carrying on the functions of government—as for carrying the mails, or troops, or supplies, or for building ships or works for government use. In those cases the government

has no further concern with the contractor than in his contract and its execution. It has no concern with his property or his faculties independent of that. How much he may be taxed by, or what duties he may be obliged to perform towards, his State is of no consequence to the government, so long as his contract and its execution are not interfered with. In that case the *contract* is the means employed for carrying into execution the powers of the government, and the *contract* alone, and not the contractor, is *exempt* from taxation or other interference by the State government.

But where the General government creates a corporation as a means of carrying out a national object, that corporation and its powers, property, and faculties, employed in accomplishing the service, are the instrumentalities by which the government effects its objects."

In *Western Union Telegraph Company v. The City of Richmond*, 26 Grat. 1, at 34, the same distinction is stated:

"The cases do recognize a distinction between taxation of the property belonging to a private corporation employed by the general government and taxation of the instrumentalities or means of the government in the possession of such corporation. The state may tax a banking institution, but it cannot tax the currency or the government bonds belonging to such bank. It may tax the railroad, but not the mail or the munitions or other property of the government. It may tax the contractor with the government, though *not the contract.*"

So, in *Panhandle Oil Company v. Mississippi*, 277 U. S., 218, the Supreme Court of the United States held that a *sales* tax upon gasoline sales to the Federal Government by a private corporation, whose only relation to the government was that of contract, was invalid, the tax being upon the sale "before the gasoline has left the dealer's hands," *id est*, upon its activities under the Government contract. The same court recently followed this decision in the case of *Graysburg Oil Company v. Texas*, 278 U. S., 582, which involved an occupation tax based on sales, by reversing the decision of the Texas Commission of Appeals, reported in 3 S. W. (2d), 427.

In *Telegraph Company v. Texas*, 105 U. S., 460, a telegraph company sued to recover a State tax of one per cent for every message sent, without deduction for messages sent by government officers on government business. The Supreme Court of the United States stated, on page 466:

> "As to the government messages, it is a tax by the State on the means employed by the government of the United States to execute its constitutional powers, and, therefore, void. * * *
>
> It follows that the judgment, so far as it includes the tax on messages sent * * * for the government on public business, is erroneous."

San Francisco v. Western Union Telegraph Company, 96 Cal, 140 at 148, is in accord.

So also, in *Louvein v. Moody*, 12 S. W. (2d) 989, reversing the same case at 300 S. W. 957, the Texas

Commission of Appeals held that a private person owning trucks and operating them exclusively in the transportation of mail under Federal contract was entitled to exemption of such vehicles from State registration, the Commission stating, at pages 989-990:

> "Of tolls required for passage of privately owned vehicles laden with mail being transported under contract, Chief Justice Taney (in Searight v. Stokes, 3 How. 151, 168, 11 L. Ed. 537) had this to say: 'Nobody, we suppose, will doubt that this toll, although in form it is paid by the contractors, is in fact paid by the Post Office Department. It is not a contingent expense, which may or may not be incurred, and about which a contractor may speculate; but a certain and fixed amount, for which he must provide, and which, therefore, in his bid for the contract, he must add to the sum he would be otherwise willing to take.' * * *
>
> If the Texas statute be applicable to Louwein in regard to his mail trucks, it makes penal use of those trucks in carrying the mail unless he first pay the 'fee' or 'tax'. *Use of the trucks upon highways, and not ownership*, is the subject-matter burdened. The cases cited, in our opinion, settle the matter of 'practical effect' as increasing the cost to the United States of execution of its power and duty (section 8, cl. 7, artl. 1) to establish and operate post offices, etc., and that, too, in a way sufficiently direct as to be an interference with the free execution of that power."

This Court has relied most strongly on *Metcalf and Eddy v. Mitchell*, 269 U. S., 514. With the greatest

respect for this Court, we do not believe that case and *Kreipke v. Commissioner of Internal Revenue*, 32 Fed. (2d) 594, are in conflict with the *Panhandle Oil Company* case and the other cases *supra*. These decisions involve taxes upon income, salary, or other receipts by government contractual agents and do not involve taxes on Federal contracts or sales or other operations thereunder. Since the tax involved in this case is on "property-used exclusively in the operation of their business in this State" as distinguished from a tax on income or receipts from such business—we submit that such cases have no bearing upon the present appeal.

However, the rule of the *Metcalf and Eddy* case, *supra*, is stated by the court subject to the following qualifications, pages 525-6:

> "Nor are we to be understood as laying down any rule that taxation might not affect agencies of this character in such a manner as directly to interfere with the functions of government and thus be held to be void. See *Railroad v. Peniston, supra*, page 36; *Farmers Bank v. Minnesota, supra*, p. 522; *Choctaw & Gulf Railway Co. v. Harrison, supra*, p. 272.
>
> But we do decide that one who is not an officer or employee of a state, does not establish exemption from federal income tax merely by showing that his income was received as compensation for service rendered under a contract with the state."

Compare with the above case *People of the State of New York v. Jacob A. Cantor*, 236 N. Y., 417, holding illegal the inclusion in taxable assets assessed to an

individual of unpaid money due him upon a war contract with the Federal Government, the court stating:

> "If we should assume that a state, carried away by some species of popular passion, or some fatuous theory of Federal and state relations, could enact a law providing that the amount coming due to one of its citizens from the Federal government under such a contract as this should be taxed at 50 per cent of its amount, we think no one could doubt that the Federal government would be hindered or embarrassed by such action in making contracts to enable it to carry on war. It either would not be able to get persons to take such contracts, or it would be compelled to add to the amount of compensation to be paid to them the extra amount which the state proposed to take by way of taxation. Either result would be a handicap and a source of hindrance, and, in our judgment, would clearly come within the abiding principles laid down in M'Culloch *v.* Maryland, 4 Wheat. 316, 4 L. Ed., 579, and the Banks *v.* New York (New York *ex. rel.* Bank of New York Nat. Bkg. Asso. *v.* Connelly) 7 Wall. 16, 19 L. Ed., 57. The fact that the tax might be 2 per cent instead of 50 per cent would alter the amount of embarrassment, but not the principle involved.
>
> There is called to our attention by respondents the case of Hibernia Sav. & L. Soc. *v.* San Francisco, 200 U. S., 310, 50 L. ed., 495, 26 Sup. Ct. Rep., 265, 4 Ann. Cas., 934, which holds that the rule that states cannot tax official agencies of the Federal government does not apply to obligations such as checks and warrants avail-

> able for immediate use. That case does not, in our opinion, modify the principles which we think must be applied to the present one. Of course, a time must be reached when the proceeds of such a contract as this would lose their character as connected with and incidental to a Federal contract, and become the ordinary personal property of the person who has received them."

This precise point was decided in favor of petitioner's contention in *Commonwealth of Pennsylvania v. Lehigh Valley Railroad Company*, 4 Dauphin County Reports, 174, 176, where it was held that gross receipts from the transportation of United States mail had to be excluded from the computation of the gross-receipts tax assessed against a railroad.

The California Legislature, itself, in the most unqualified terms, has expressed the fact that it does not intend to tax gross receipts of this kind, by passing a statute exempting such receipts (Political Code, Section 3664*aa*, as amended by Chapter 780 of the Statutes of 1929.)

On all established theories of taxation it is clear that in this case it should be determined that the attempt to tax petitioner's mail contract as such is invalid and likewise that if the State laws are to be construed as attempting such a tax not directly upon the mail contract, but indirectly in the guise of an additional tax burden on the physical property itself, then that attempt also must fail.

Apart from all theory, it is patent enough that, whether in the guise of a tax on his contract or in the

guise of a tax on his physical property, petitioner has to pay to the State 5 per cent of the amounts the government pays him under his mail contract. The result in the end will be that he will have to charge the government an additional 5 per cent the next time he bids on his mail contract. The imposition of a charge of this kind by the State, computed directly upon the amount of compensation received from the United States, can have only one result, an increase in the amount of compensation the United States has to pay. In the end the United States will be paying taxes to the state.

B.

The tax as levied is arbitrary, confiscatory, and constitutes the taking of property without due process of law.

1. THE GROSS RECEIPTS TAX ON HIGHWAY TRANSPORTATION COMPANIES IS ESSENTIALLY A TAX UPON OPERATIVE PROPERTY AND IS NOT A TAX ON GROSS RECEIPTS OR INCOME OF SUCH PROPERTY.

The tax is clearly a property tax upon all operative property used in producing the gross receipts on which the tax is based.

Section 15 of Article XIII of the Constitution provides:

> "(*a*) All such companies engaged in the business of transportation of persons, or persons and baggage, or persons and express, or persons,

baggage and express where the same is transported on the same automobile, jitney bus, state or auto stage transporting said persons shall annually pay to the State a tax upon their franchises, cars, equipment, and other property, or any part thereof, *used exclusively in the operation of their business in that State*, equal to four and one-quarter per cent of the gross receipts from operations of such companies, and each thereof, within this State.

All such companies operating trucks or auto trucks engaged in the business of transporting property shall annually pay to the State a tax upon their franchises, trucks or auto trucks, equipment, and other property, or any part thereof, *used exclusively in the operation of their business in this State*, equal to five per cent of the gross receipts from operations of such companies, and each thereof within this State. * * *

Such taxes shall be in lieu of all other taxes and licenses, State, county and municipal, *upon the property above enumerated* of such companies."

The court has clearly recognized this in its opinion in this case, saying:

"The question as to whether or not the taxes levied for state purposes by section 14 of article XIII, upon the gross receipts of the utilities there enumerated, are taxes upon property has several times been considered by this court, and in each instance it has been declared to be essentially a property tax. (*Pullman v. Richardson*, 185 Cal., 484, 487, 197 Pac., 346, affirmed in

261 U. S., 330, 339, and cases there cited.) The tax required by section 15 of article XIII of the Constitution on the gross receipts of appellant's business is the identical kind of a tax required by section 14, and is, like the other, esssentially, a property tax."

2. THE GROSS RECEIPTS TAX IS INTENDED TO BE APPROXIMATELY THE EQUIVALENT OF AN AD VALOREM TAX ON THE PROPERTY AT A GIVEN RATE. IT WAS FIXED SO AS TO MAKE THE TAX THE EQUIVALENT AS A FAIR TAX VALUE ON ALL OPERATIVE PROPERTY IN USE AT ITS VALUE.

The value of property ultimately depends on its net earnings (*Pullman Co. v. Richardson*, 185 Cal. 484, 496). Capitalizing the net earnings of property at an interest rate equivalent to a fair return to investors in securities of the operating corporation gives the value of the property. Since the proportion between gross earnings and net earnings of the various classes of public-service corporations can be ascertained, the value of the property to be taxed by the gross-receipts method has an ascertainable relation to gross earnings and can be approximately valued from its gross earnings. By fixing the gross-receipts tax at a rate sufficient to yield a fair tax on the value so computed, the gross-receipts tax would be made equal" to the burdens on property taxed on the *ad valorem* plan.

The Commission explained its method for ascertaining what tax rate on gross earnings is approximately the equivalent of a given rate of taxation of property for purposes of the tax imposed by Section 14 of Article

XIII of the Constitution (which is the identical kind of tax required by Section 15), as follows:

> "Briefly stated, that method is: To determine what tax rate on gross earnings is the equivalent of a given rate on the property, for a given class of public-service corporations, (1) ascertain what percentage of the gross earnings is net, (2) ascertain what rate of interest would constitute a fair return to investors in the securities of the class of public-service corporations under consideration, then (3) divide the percentage of net earnings by the rate of interest and multiply the result by the given tax rate on property. *This method is not as rigid or as infallible as the mathematical statement of it might seem to imply. There is still room for difference of opinion.* But it has been found of great practical value in testing the probable effect of different rates on any set of assumptions." (Report of Commission on Revenue and Taxation, 1906, pp. 94-95.)

The foregoing method was summarized in the special report of the State Board of Equalization for the year 1912 as follows (pp. 7-8):

> "In substance, that method was to ascertain for each of the different classes of corporations the normal or typical ratio of net earnings to gross earnings, and then to capitalize the earnings so ascertained at a rate of interest assumed to constitute a fair return to the investors in the securities of such classes of corporations. A theoretical value for the property and franchises in use having been ascertained in this manner, it was then assumed (as the data then

> available seemed to indicate to be the case) that the average burden of taxation throughout the state was one per cent of the true value of the taxed property, and one per cent of this theoretical valuation of the typical corporation's property of each class having been computed, the next step was to ascertain what rate applied to the gross earnings of such companies would yield an amount equal to that one per cent of the valuation. These theoretical rates, having been ascertained on the basis of a study of the typical or normal company, were then tested by ascertaining their probable effect upon California companies of each of the different classes."

The Commission on Revenue and Taxation thus regarded gross receipts as merely the measure of tax to be paid by public-service corporations; the tax itself, in its essential nature, was to be a *fair tax on property valued by net earnings.*

In *Edward W. Hopkins v. Southern California Telephone Co. and The Pacific Telephone and Telegraph Company,* 275 U. S. 393, at 401, the United States Supreme Court stated:

> "Sec. 14, Article XIII (adopted 1910), was proposed by a Commission which gave the matter much consideration and made an elaborate report. It is a result of an earnest effort to provide for enforcement of adequate contributions from public service and some other corporations while avoiding double and unjust taxation. Payment of specified percentages (subject to change by the Legislature) of gross re-

ceipts was directed upon the theory that the value of operative property could be fairly measured by considering receipts therefrom. Also, that by paying to the State a portion of these, the corporation would, in effect, contribute for its operative property the substantial equivalent of all taxes laid upon other property. The Commission (Rep. 1910, p. 19) said: 'In explanation of the above rates it may be stated that they are fixed on the theory that these proportions of the gross receipts will in each case equal the average burden of taxation on other classes of property. The method of arriving at the different rates is explained in detail in the 1906 report of this commission.'

The Supreme Court of the State has declared the gross receipts tax is essentially one on property, *Pullman Company v. Richardson*, 185 Cal., 484, 487; and it apparently approves the view that 'a fair tax upon gross earnings bore such a relation to the values of these properties under their unity of use as to justify such a tax upon revenue as being a legal and commutated or substituted tax for other taxes which were or might have been levied.' (*Pacific Gas & Electric Co. v. Levee District No.* 1, 172 Cal., 345; *Great Western Power Co. v. City of Oakland*, 189 Cal., 649. * * *

We think the purpose of the 1910 Amendment is to tax all operating property of a telephone company by ascertaining the gross receipts and taking therefrom the specified percentage. Thus, the imposition becomes approximately equal to what other property bears. *Unless the gross receipts tax be so treated, some very serious questions under the Federal Constitution are almost certain to arise.*"

3. A PLAN OF TAXATION THAT IS ARBITRARY AND THE VALUATION GROSSLY EXCESSIVE IS IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

The gross-receipts tax being a property tax must rest on all property which contributes to gross receipts. The property which contributed to the gross receipts on which petitioner's tax was based was its physical property and a Federal mail contract. *Ergo*, part of the tax must have been upon the mail contract.

The same conclusion is enforced by a slight consideration of the figures involved here. The complaint alleges that the only things used in earning these gross receipts are certain physical properties and the mail contract; that the physical properties have an actual market value not in excess of $15,000 (Paragraph V, R., page 3), and that their replacement cost would not exceed that sum (Paragraph VII, R., page 4). As the case is before this Court on demurrer, these allegations stand admitted. The tax on petitioner's receipts should be:

Passenger income	$374 14
Freight income	490 32
Total	$862 46

or at the rate of over 5¾ per cent upon the full value of the physical properties.

As we have said, the intent in levying the gross-receipts tax was to tax the operative property at ap-

proximately the same rate that non-operative or common property would be taxed. Thus, the Tax Commission at great length determined what was the real tax burden borne by common property in the different counties of California and showed that in the various counties it ran from 77 cents per hundred dollars in Madera County to $2.67 per hundred dollars in Sutter County (Table 11-16, Final Report of the California Tax Commission, March 5, 1929, page 167). The average rate computed on various hypotheses ran from $1.42 to $1.79 (Table 11-30, page 182), or from $1.42 to $1.81 (Table 1-14, page 62). Similar computations were made for the corporations taxed in accordance with their gross receipts, and it was found that the tax burden varied from $.493 to $2.289, depending upon what theory was taken (Table 11-31, page 185). The report contains detailed computations on various theories showing the application to individual companies and classes of companies of this method of analysis.

From this report it is apparent that only in the exceptional case do these gross receipt taxes even approach the tax rate which would be imposed upon the petitioner here, even though the receipts from the mail contract were excluded from the computation of this tax. With the mail receipts included we find the total tax $2,878.78, or at the rate of $19.19 per hundred dollars on the value of the physical properties. Obviously, no legislation was intended to tax petitioner's physical properties at the rate of $19.19 per hundred dollars. It was only because the taxing authorities insisted upon including in their computation of the tax

not only the gross receipts from the operation of the physical properties, but also the gross receipts from the mail contract, that this astounding result was reached.

The California authorities recognize that under the decision of *Pullman Co. v. Richardson, supra,* it is the duty of the State, where a taxpayer operates both interstate and intrastate business, to determine whether or not the tax ostensibly levied upon its property in California is really a tax upon interstate commerce, and in making that determination to consider whether "the burden upon the property of interstate commerce carriers is out of all reasonable proportion to that imposed upon the property of others within the State" (*Pullman Company v. Richardson,* 185 Cal. 484 at 509). The California Supreme Court apparently overlooked that we have precisely the same kind of situation here. The non-taxable element in this case is not interstate commerce as in the *Pullman* case, but the mail contract, and in determining whether or not a tax is assessed upon the mail contract, it is necessary to consider whether the tax imposed upon the taxable physical property of the taxpayer which is used in connection with the non-taxable property of the contract is "out of all proportion to that imposed upon the property of others within this State."

We submit that the figures shown above demonstrate conclusively that if the receipts of the mail contract are included in the computation of the tax, then the tax, if regarded as a tax solely upon the physical property, is out of all proportion to the tax imposed

upon the property of others within the State. It cannot reasonably be contended that a tax of $19.19 per hundred dollars of the full value of the property is really a tax upon the physical property itself. Obviously, as construed by the State taxing authorities, this tax law in the guise of a tax upon the taxable physical property really imposes a tax upon the nontaxable contract.

In *Union Tankline Co. v. Wright*, 249 U. S. 275, at page 282, this Court says:

> "But if the plan pursued is arbitrary and the consequent valuation grossly excessive, it must be condemned because of conflict with the commerce clause or the Fourteenth Amendment or both. Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 117; Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 26; Adams Express Co. *v.* Ohio, 165 U. S. 194, *s. c.*, 166 U. S. 185; American Refrigerator Transit Co. *v.* Hall, 174 U. S. 70; Union Refrigerator Transit Co. *v.* Lynch, 177 U. S. 149; Fargo *v.* Hart, 193 U. S. 490; Cudahy Packing Co. *v.* Minnesota, 246 U. S. 450, 453."

Your petitioner in his complaint, Paragraphs III, V, VI and VII (R. 2-4), sets forth facts showing the valuation of the property used in carrying United States mails and parcels post, the rate of taxation on other property not so used and the consequent valuation that would have to be put upon your petitioner's property in order to make it produce the tax assessed against it at the rate at which other property not used as your petitioner's property is used. The facts as al-

leged in your petitioner's complaint upon demurrer stand admitted.

By the provisions of Section 15 of Article XIII of the Constitution of the State of California, this tax should be levied against *common carriers only.* Your petitioner herein contends that as a mail carrier or contractor he is not a *common carrier;* that to classify him as such arbitrarily constitutes the taking of his property without due process of law.

Petitioner desires to call attention to the provisions of Section 15, Art. XIII, of the Constitution of the State of California in this regard, which reads as follows:

> "Taxes levied, assessed and collected as hereinafter provided on companies owning, operating or managing any automobile truck or auto truck, jitney bus or auto stage used in the business of transportation of persons or property *as a common carrier,* for compensation, etc."

This section, by its express terms, applies only to common carriers. Petitioner contends that a mail carrier or contractor is not, within the law, a common carrier. Common carriers generally are defined in 10 *C. J.* 39, as follows:

> "A common carrier has been defined as 'one who undertakes, for hire or reward, to transport the goods of such as choose to employ him, from place to place.' This definition applies to common carriers by land and by water, without regard to distance or motive power."

In *Frost v. R. R. Comm.*, 197 Cal. 230, at p. 235, the court says:

> "A carrier who files with the Railroad Commission a schedule of his routes, tariffs, and charges, who is under compulsion to render transportation service of the kind, character, and quality prescribed by the Commission, who is disabled to enter into a contract for the rendition of transportation service of any kind, quality or character different from that prescribed, or for a rate of compensation either greater or less than the prescribed rate, is at least subjected to the disabilities and limitations which circumscribe a public or common carrier (10 *C. J.* 37 *et seq.*). It is conceded that the state has no power by mere legislative fiat, or even by constitutional enactment, to transmute a private utility into a public utility, or a private carrier into a public carrier."

The foregoing case was reversed by the Superior Court of the United States in *Frost v. R. R. Comm.*, 271 U. S. 583. On page 590, the court says:

> "Plaintiffs in error were engaged under a single private contract in transporting, for stipulated compensation, citrus fruit over the public highways between fixed termini. They were brought before the commission charged with violating the act, for the reason that they had not secured from the commission a certificate of public conveyance and necessity. The commission, while agreeing that plaintiffs in error were, in fact, private carriers, held that they were subject to the provisions of the act

and directed them to suspend their operations under their contract unless and until they should secure a certificate that public convenience and necessity required the resumption or continuance thereof. The commission's order was upheld by the State supreme court, 70 Cal. Dec., 457.

"On behalf of plaintiffs in error the contention is that, in its application to private carriers, the act has the effect of transforming them into public carriers by legislative fiat. Upon the other side it is said that the sole purpose of the legislation 'is to impress upon such private carriers certain regulations so long as they desire to use the publicly built and owned highways as the chief situs of their business of hauling goods for compensation' and that 'they are not, and cannot be, forced, directly or indirectly, to become common carriers.'

"It is unnecessary to inquire which view is correct, since the act has been authoritatively construed by the state supreme court. That court, while saying that the state was without the power, by mere legislative fiat or even by constitutional enactment, to transmute a private carrier into a public carrier, declared that the state had the power to grant or altogether withhold from its citizens the privilege of using its public highways for the purpose of transacting private business thereon; and that, therefore, the legislature might grant the right on such conditions as it saw fit to impose. In the light of this general statement of principle, it was held that the effect of the transportation act is to offer a special privilege of using the public highways to the private carrier for compensa-

> tion upon condition that he shall dedicate his property to the quasi-public use of public transportation; that the private carrier is not obliged to submit himself to the condition, but, if he does not, he is not entitled to the privilege of using the highways."

In the present case the petitioner is engaged under a contract with the Post Office Department of the United States Government in carrying United States mails. That such a carrier is not a common carrier, see 10 *C. J.* 52, where it is said:

> "Postmasters are not common carriers and there is no analogy between them. Likewise a carrier of the mails is not liable, as a common carrier, to the sender of a letter."

In 2 *Camp. Comm.* (12th ed.), at page 610, it is said:

> "The post office establishment is a branch of the public police and created by statute and the government for management and control of the whole concern. The postmasters enter into no contract with individuals and receive no hire by common carrier, in proportion of the risk and value of loss in their charge, but only a general compensation from the government."

See in accord:

U. S.: *Dunlop v. Munroe*, 7 *Cranch* 242, 3 L. Ed. 329;

Bankers' Mut. Casualty Co. v. Minneapolis, etc., R. Co., 117 Fed. 434, 54 C. C. A. 608; 65 L. R. A. 397 (Aff. 113 Fed. 414);

Boston Ins. Co. v. Chicago, etc., R. Co., 118 Iowa 423, 92 N. W. 88, 59 L. R. A. 796;
Foster v. Metts, 55 Miss. 77, 30 Am. R. 504;
Powell v. Mills, 30 Miss. 231, 64 Am. D., 158;
Hutchins v. Brackett, 22 N. H. 252, 53 Am. D., 248;
Wiggins v. Hathaway, 60 Barb. 632;
Conwell v. Voorhees, 13 Oh. 523, 42 Am. D., 206;
Schroyer v. Lynch, 8 Watts 453;
Bolan v. Williamson, 2 S. C. L. 551.

"Between a contractor for carrying the public mails, and the sender of letters, there is no privity of contract, and the contractor has no right to, and receives no remuneration from the sender. The Government undertakes the transmission of the mails, and receives pay therefor by the postage charged. The contractor's contract is with the Government, and by it his compensation is paid. He owes a duty, not to the sender of letters as an individual, but to the integral public, springing from his agreement to carry the mails. The public is not the proper subject of a common carrier's charge, and the extraordinary responsibility attached by law to such employment does not attach to a mail contractor. He does not become an insurer of the safe transportation of mail matter; the extent of his liability is the same as that of a bailee for hire." *Central R. Co. v. Lampley,* 76 Ala. 357, 364, Am. R. 334.

Conclusion.

It is respectfully submitted in the light of the foregoing authorities cited that this case is one in which a review by this Court is proper.

Dated San Francisco, California, January 16, 1930.

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